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IN THE

Supreme Court of the United States

MAHMOUD CHERIF BASSIOUNI
a/k/a M. CHERIF BASSIOUNI,

Petitioner,

v.

CENTRAL INTELLIGENCE AGENCY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a case in which the Central Intelligence Agency (CIA) has admitted to the existence of responsive records and has failed to assert a *Glomar* response, is a circuit court at liberty, in light of the separation of powers doctrine, to exempt the CIA from the requirements of the Freedom of Information Act (FOIA) and the Privacy Act (PA) *in toto* by authorizing the creation of a new "no number, no list" response, which Congress has never sanctioned and for which there is no statutory or regulatory authority, whereby litigants are summarily deprived of the opportunity for any judicial review or meaningful adversarial testing of the propriety of an agency's claimed exemptions upon an agency's invocation of "national security" concerns? The Seventh Circuit's ruling involves an important question of federal law that has not been, but should be, settled by this Court because it directly threatens the continued vitality of FOIA and the PA with respect to any executive agency that claims to be involved in the fight against terrorism.

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Mahmoud Cherif Bassiouni a/k/a M. Cherif Bassiouni, Petitioner, respectfully petitions this Court for a writ of *certiorari* to review the erroneous opinion of the United States Court of Appeals for the Seventh Circuit, Case No. 04-2258, dated December 8, 2004. The circuit court decided an important question of federal law that has not been, but should be, settled by this Court and, in so doing, the circuit court departed from settled principles established by this Court.

OPINIONS BELOW

On December 8, 2004, the United States Court of Appeals for the Seventh Circuit issued its opinion (published at 392 F.3d 244) (Pet. App. at 1a) affirming the district court's ruling (published at 2004 U.S. Dist. LEXIS 5290) (Pet. App. at 9a). The United States Court of Appeals for the Seventh Circuit denied Petitioner's request for rehearing *en banc* on February 1, 2005 (published at 2005 U.S. App. LEXIS 1939) (Pet. App. at 30a).

STATEMENT OF JURISDICTION

The *certiorari* jurisdiction of this Court is invoked in conformity with 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Article I § 1 of the United States Constitution declares: "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ."

Section 552(a)(4)(B) of the Freedom of Information Act (FOIA) provides, in pertinent part, that "[o]n complaint, the

district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (2000).

Similarly, section 552a(g)(3)(A) of the Privacy Act (PA) provides that "[i]n any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him." 5 U.S.C. § 552a(g)(3)(A) (2000).

Executive Order No. 12,958 states that, in response to a FOIA or PA request, "an agency may refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified under this order." Exec. Order No. 12,958, § 3.7, 60 Fed. Reg. 19,825, *reprinted as amended in* 50 U.S.C. § 435 (2000).

Likewise, the CIA's implementing regulations for processing requests under both FOIA and the PA provide, in identical language:

> In processing a request, the Agency shall decline to confirm or deny the existence or nonexistence of any responsive records whenever the fact of their existence or nonexistence is itself classified under Executive Order 12958 or revealing of intelligence sources and methods protected pursuant to section 103(c)(5) of the National Security Act of 1947. In such circumstances, the Agency, in the form of a final written response,

> shall so inform the requester and advise of his or her right to an administrative appeal.

32 C.F.R. § 1900.21(c) (2003) (pertaining to FOIA requests); 32 C.F.R. § 1901.21(c) (2003) (pertaining to PA requests).

STATEMENT OF THE CASE

By letter dated November 22, 1999, Professor M. Cherif Bassiouni wrote to the Central Intelligence Agency (CIA) seeking access to records in the agency's possession concerning himself under the Freedom of Information Act (FOIA) and the Privacy Act (PA), which request is the subject of the instant case.[1] The CIA subsequently denied Bassiouni's request and invoked FOIA exemptions (b)(1) and (b)(3) and PA exemptions (j)(1) and (k)(1). On June 6, 2002, after fully exhausting his administrative remedies, Bassiouni filed a complaint for declaratory and injunctive relief pursuant to FOIA, 5 U.S.C. § 552, and the PA, 5 U.S.C. § 552a, for access to documents. After the district court denied as premature Bassiouni's motion to compel production of a *Vaughn* index, the CIA filed a motion for summary judgment. In the declaration filed in support of the CIA's motion, Information Review Officer (IRO) William H. McNair stated that "since the CIA personnel handling plaintiff's 1983 PA request acknowledged the Agency held material on plaintiff at that time, CIA cannot use the Glomar response in 2003." The CIA, however, by means of McNair's Declaration, asserted that it was instead entitled to employ a "no number,

1. In August 1983, Bassiouni submitted a PA request to the CIA for information pertaining to himself. In June 1985, the CIA responded to this request and admitted that it had in its possession responsive material; however, the CIA advised Bassiouni that the material could not be declassified or released in segregable form.

no list" response. In this regard, IRO McNair wrote that "[t]he only practical alternative at this point, to protect classified and otherwise exempt information, is to use the 'no number, no list' response. . . ." On March 30, 2004, the district court issued an opinion in which it granted the CIA's motion for summary judgment, holding that, although the "exact wording" of the "no number, no list" response could not be found in either Executive Order No. 12,958 or the CIA's implementing regulations, the CIA was not barred from employing such a device. (Pet. App. at 22a-23a).

On December 8, 2004, the Seventh Circuit affirmed the judgment of the district court, opining as follows:

> Perhaps it would be best to jettison the distinction between a "*Glomar* response" (refusing to acknowledge whether the CIA has even one responsive document) and a "no number, no list response" (acknowledging that the CIA has at least one responsive document but refusing to elaborate). . . . Because it is the *details* that could tip the agency's hand, they are what matter. From now on, a "*Bassiouni* response" could cover both situations. . . .

(Pet. App. at 6a (emphasis in original)). The panel further suggested that "Bassiouni is better off under a system that permits the CIA to reveal some things . . . without revealing everything. . . ." (Pet. App. at 6a) Moreover, in creating what it styled as the new "*Bassiouni* response," the panel stated that it believed the verbal distinction between the traditional *Glomar* response and the CIA's "no number, no list" response "should be eliminated, lest it confuse or mislead requesters and judges into thinking that something depends on the turn of phrase." (Pet. App. at 6a)

REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW INVOLVING THE CONTINUED VITALITY OF THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT IN LIGHT OF THE SEVENTH CIRCUIT'S APPROVAL OF A NEW "NO NUMBER, NO LIST" RESPONSE, WHICH CONGRESS HAS NEVER AUTHORIZED AND WHICH PERMITS EXECUTIVE AGENCIES TO NULLIFY A LITIGANT'S RIGHT TO JUDICIAL REVIEW OF AN AGENCY'S CLAIMED EXEMPTIONS UPON AN AGENCY'S BARE ASSERTION THAT "NATIONAL SECURITY" CONCERNS ARE IMPLICATED.

> [I]n times of distress the shield of . . . national security must not be used to protect governmental actions from close scrutiny and accountability.
>
> – *Korematsu v. United States*
> 584 F. Supp. 1406, 1420 (N.D. Cal. 1984)

In the instant case, the Seventh Circuit has authorized the CIA to utilize a so-called "no number, no list" response as a means of preventing disclosure litigants from any adversarial testing of the CIA's claimed exemptions where the agency alleges that the documents at issue could impact "national security" – even in cases, such as herein, where the CIA has determined that a *Glomar* response is not appropriate. The Seventh Circuit's decision effectively exempts the CIA *in toto* from the strictures of FOIA and the PA, and permits the CIA to nullify the well-recognized right of requesters to seek judicial review of an agency's claimed

exemptions through meaningful adversarial testing in the form of a *Vaughn* index.

In addition, in authorizing the creation of this broad-sweeping exemption, which Congress has never enacted, the Seventh Circuit has engaged in judicial lawmaking, which is strictly prohibited by the separation of powers doctrine. Accordingly, this Court should grant the instant petition to clarify the interrelated issues of: (1) whether the CIA may unilaterally exempt itself from FOIA and the PA upon the bare assertion that a case implicates "national security" without affording a plaintiff the opportunity to subject such a claim to any scrutiny; and (2) whether, in sanctioning the CIA's nullification of a plaintiff's statutory right to judicial review, the Seventh Circuit panel violated this Court's oft-quoted pronouncement that courts are prohibited from creating statutory exceptions where Congress has refused to do so.

A. Nullification of Statutory Right to Judicial Review of Claimed Exemptions

When Congress drafted FOIA and the PA, it provided that, on complaint, the district court shall have the jurisdiction to enjoin the agency from withholding agency records and to order their production. *See* 5 U.S.C. § 552(a)(4)(B) (2000); 5 U.S.C. § 552a(g)(1)(B), (3)(A) (2000). The CIA is an "agency" subject to both FOIA and the PA. *See* 5 U.S.C. § 552(f) (2000); 5 U.S.C. § 552a(1) (2000). For more than 30 years now, the propriety of an agency's claimed exemptions has been determined *by the district court* only after the agency first provides the plaintiff with a *Vaughn* index, which consists of a listing of the documents at issue, usually including date, author, and general subject matter,

and a brief explanation of why the agency asserts some classified or otherwise exempted portion of a record (or the entire document) must be redacted or otherwise withheld. *See Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973). It is only by means of the *Vaughn* index that a litigant can have an opportunity to have any meaningful adversarial testing of an agency's claimed exemptions. *See Wiener v. FBI*, 943 F.2d 972, 978 n.5 (9th Cir. 1991) ("The role of the *Vaughn* index in enabling the adversary process to function in FOIA cases is universally recognized."); *see also Becker v. IRS*, 34 F.3d 398, 402 n.11 (7th Cir. 1994) (recognizing that, even with the *Vaughn* index, the requester is placed at a distinct disadvantage because he does not know the specific contents of the document or its redacted portion and may not be familiar with the background facts).

A *Glomar* response,[2] however, may be invoked where an agency claims that "even the confirmation or denial of the existence of records at issue would pose a threat to national security." U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 98-99 (May 2002 ed.) [hereinafter PRIVACY ACT OVERVIEW]. For example, IRO McNair explains in his declaration that "[u]nder normal circumstances, when CIA receives a FOIA or PA request for records on an individual, it provides a 'Glomar response' unless it already has publicly acknowledged a relationship with the individual. That is, CIA refuses to confirm or deny that it holds records pertaining to the individual." In like manner, the Department of Justice points out that the "'neither confirm nor deny' response [is] now known

2. The term "*Glomar*" refers to the *Hughes Glomar Explorer*, a large research vessel that was the subject of the CIA's first litigated efforts to neither confirm nor deny the existence of requested records. *See Phillippi v. CIA*, 546 F.2d 1009, 1010-11 (D.C. Cir. 1976).

as 'Glomar' response or 'Glomarization.'" PRIVACY ACT OVERVIEW, *supra*, at 98-99. Case law similarly supports the understanding that *Glomar* is synonymous with an agency's refusal to "confirm or deny" the existence of responsive records. *See* PRIVACY ACT OVERVIEW, *supra*, at 99 n.63 (collecting cases).

The *Glomar* response is specifically described in section 3.7 of Executive Order No. 12,958, which provides that, in response to a FOIA or PA request, "an agency may refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified under this order." Exec. Order No. 12,958, § 3.7, 60 Fed. Reg. 19,825, *reprinted as amended in* 50 U.S.C. § 435 (2000). Similarly, the CIA's implementing regulations for processing requests under both FOIA and the PA provide, in identical language:

> In processing a request, the Agency shall decline to confirm or deny the existence or nonexistence of any responsive records whenever the fact of their existence or nonexistence is itself classified under Executive Order 12958 or revealing of intelligence sources and methods protected pursuant to section 103(c)(5) of the National Security Act of 1947. In such circumstances, the Agency, in the form of a final written response, shall so inform the requester and advise of his or her right to an administrative appeal.

32 C.F.R. § 1900.21(c) (2003) (pertaining to FOIA requests); 32 C.F.R. § 1901.21(c) (2003) (pertaining to PA requests).

In the present case, however, the CIA admitted that "since the CIA personnel handling plaintiff's 1983 PA request acknowledged the Agency held material on plaintiff at that time, CIA cannot use the Glomar response in 2003." As recognized by IRO McNair, once the CIA revealed that it was maintaining records pertaining to Bassiouni, it could not, by definition, invoke a *Glomar* response.

Yet, rather than following the normal course of disclosure litigation and providing Bassiouni with a *Vaughn* index, the CIA instead attempted to assert an entirely new defense, which it called the "no number, no list" response. In this regard, IRO McNair wrote in his Declaration that "[t]he only practical alternative at this point, to protect classified and otherwise exempt information, is to use the 'no number, no list' response. . . ." There is, however, *no statutory or regulatory provisions* authorizing the use of such a defense. No such exemption can be found anywhere in FOIA or the PA. In fact, prior to the Seventh Circuit's decision, there was not a single reported case in the country that even made mention of this response.

Instead, although conceding that the *Glomar* response and the "no number, no list" response are distinct, the former being where the agency "refus[es] to acknowledge whether the CIA has even one responsive document" and the latter where the agency "acknowledg[es] that the CIA has at least one responsive document but refus[es] to elaborate," the Seventh Circuit stated that "[n]either name has any magic; the statute and the executive order in combination, not the CIA's nomenclature, are dispositive." (Pet. App. at 6a) The panel further opined that the *Glomar* response and the "no number, no list" response "are functionally identical" and recommended that "the verbal distinction should be

eliminated, lest it confuse or mislead requesters and judges into thinking that something depends on the turn of phrase." (Pet. App. at 6a)

Contrary to the panel's assertion, however, the *Glomar* response and the "no number, no list" response are not "functionally identical"; in fact, they are both temporally and functionally distinct. With regard to the timing of the responses, according to CIA implementing regulations, the agency *must* issue a *Glomar* response in connection with processing an administrative request: "In such circumstances, the Agency, in the form of a final written response, shall so inform the requester and advise of his or her right to an administrative appeal." 32 C.F.R. § 1900.21(c) (2003); 32 C.F.R. § 1901.21(c) (2003). On the other hand, a "no number, no list" response could be asserted only after a complaint was filed in federal court. With respect to their divergent goals, the *Glomar* response is designed for the sole purpose of concealing the fact of whether an agency has records on a particular individual or subject. The "no number, no list" response, however, has been created with the express purpose of concealing the amount or nature of the withheld documents from a litigant who is already aware that the agency is in possession of records pertaining to his or her request.

As such, the "no number, no list" response is nothing more than an illegal prophylactic device designed to shield the agency from its responsibilities under *Vaughn* and to subvert a requester's statutory right under FOIA and the PA to test the propriety of the agency's claimed exemptions under the eyes of an impartial judicial arbiter. *See* 5 U.S.C. § 552(a)(4)(B) (2000); 5 U.S.C. § 552a(g)(1)(B), (3)(A) (2000).

Moreover, to permit such a defense to stand would allow a plethora of executive agencies, who were previously subject to judicial review under FOIA and the PA but who now have been assigned various roles in protecting the United States against the threat of terrorism, to exempt themselves from public scrutiny in disclosure litigation by simply uttering the talismanic phrase "national security." In today's climate of oppressive executive secrecy, and in light of recent revelations of serious abuses and ineffectiveness within such agencies, this Court must ensure that the workings of government remain open and that executive agencies remain subject to the legislative constraints wisely incorporated into FOIA and the PA – the most important of which is judicial scrutiny. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring):

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be the last, not first, to give them up.

This Court should accept review to clarify that only Congress may declare a particular agency exempt from the watchful eye of public scrutiny that is the hallmark of FOIA and the PA.

B. Separation of Powers Doctrine Precludes Judicial Lawmaking

The separation of powers doctrine is a preeminent feature of the American constitutional dynamic. *See Mistretta v. United States*, 488 U.S. 361, 380 (1989) (reaffirming "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"); *see also* U.S. CONST. arts. I, II & III. With respect to the power to make laws, the United States Constitution unequivocally states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States. . . ." U.S. CONST. art. I § 1. As Justice Black wrote, "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears, that lay behind their choice." *Youngstown*, 343 U.S. at 589.

In *Freytag v. CIR*, 501 U.S. 868 (1991), this Court declared that courts "are not at liberty to create an exception where Congress has declined to do so." *Freytag*, 501 U.S. at 874 (quoting *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989)). Moreover, as the Seventh Circuit itself has previously cautioned: "Certainly, federal judges must not reach out and grasp at straws in an attempt to rewrite the laws duly enacted by the legislative branch of government, the Congress." *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1271 (7th Cir. 1993). *See Stiffler v. Lutheran Hospital*, 965 F.2d 137, 140 (7th Cir. 1992) ("It is a well-established principle of statutory construction that silence is not an invitation to embark on a path of judicial lawmaking.").

In attempting to justify why the "no number, no list" response should be permitted, the Seventh Circuit panel invoked emotionally charged "national security" shibboleths, hypothesizing that the information contained in the traditional *Vaughn* index sought by Bassiouni could be utilized by enemy nations and "terrorists," *e.g.*: "Any information available to Bassiouni is available to North Korea's secret police and Iran's counterintelligence service, too." (Pet. App. at 3a-4a) The issue in the present case, however, is not whether Bassiouni will ever obtain access to the records at issue but, instead, whether he has the right to have a district judge first review the CIA's claims and determine whether they properly fall within the particular exemptions asserted by the agency. *See Vaughn*, 484 F.2d at 826-28. Otherwise, in the future, agencies will simply invoke "national security" concerns, whether justified or not, and thereby automatically turn disclosure suits into summary proceedings. Furthermore, the Seventh Circuit panel even admitted that, absent its approval of the new "no number, no list" response, Bassiouni would have had a substantial likelihood of success in gaining access to some of the documents in his CIA file: "The agency does not contend that the *contents* of all documents mentioning Bassiouni are classified; it could hardly do so, given not only its refusal to identify which documents it holds but also the certainty that its files contain many U.N. Reports, newspaper clippings, and other non-classified materials." (Pet. App. at 2a (emphasis in original)).

It is a basic principle of statutory construction that "courts have no right first to determine the legislative intent of a statute and then, under the guise of its interpretation, proceed to either add words or eliminate other words from the statute's language." *Water Quality Ass'n v. United States*, 795 F.2d 1303, 1309 (7th Cir. 1986). Similarly, a judge may not

attempt to change the language of a statute "because he thinks Congress may have overlooked something." *Id.* This is precisely what the panel did in Bassiouni's case by sanctioning the creation of the "no number, no list" response and announcing a new "*Bassiouni* response." (Pet. App. at 6a) Here, the CIA did not assert a *Glomar* response. Apparently dissatisfied with the potential outcome in future disclosure cases, the panel attempted to fill a gap in what it perceived as a deficiency in the congressional scheme *vis-a-vis* the potential for disclosure of classified information. Yet, as iterated by this Court, "courts 'are not at liberty to create an exception where Congress has declined to do so.'" *Freytag*, 501 U.S. at 874 (quoting *Hallstrom*, 493 U.S. at 27).

In this regard, if a party wishes to change the law, "the proper forum is the Congress of the United States where all interested parties will be entitled to engage in the full panoply of hearings and arguments before the congressional and senatorial committees" and where Congress will have the opportunity to consider such proposals after due deliberation and reflection. *Welsh*, 993 F.2d at 1271. Just as the CIA may not circumvent the legislative process by unilaterally exempting itself from the strictures of FOIA and the PA, circuit courts are similarly precluded by the separation of powers doctrine from engaging in judicial lawmaking under the rubric of "interpretation." *See Water Quality Ass'n*, 795 F.2d at 1309; *see also Stiffler*, 965 F.2d at 140.

Until Congress says otherwise, the Seventh Circuit lacks the authority to prevent Bassiouni or any other disclosure litigant from his statutory entitlement to have an impartial judicial officer review the propriety of an agency's claimed exemptions before summarily dismissing his case.

Accordingly, this Court should accept review to determine whether, in the instant case, the appellate panel impermissibly trespassed on legislative territory that is reserved exclusively for Congress.

CONCLUSION

For the reasons set forth above, the Petitioner, M. Cherif Bassiouni, respectfully prays that a writ of *certiorari* issue to review the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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